

No. 12003.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE METROPOLITAN FINANCE CORPORATION OF CALIFORNIA, a corporation,

Appellant,

vs.

ELLSWORTH WOOD and ELAINE SHIPP,

Appellees.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

	PAGE
Foreword	1
I.	
Appellee, Ellsworth Wood individually, is not the only party interested in this appeal.....	1
II.	
A corporate entity will be disregarded only where it is shown that under the particular circumstances not to do so would promote injustice or sanction a fraud.....	4
III.	
Jurisdiction	7
Conclusion	8

TABLE OF AUTHORITIES CITED

CASES	PAGE
City of Los Angeles v. Knapp, 222 Cal. App. 2d 211, 70 P. 2d 6437
Kellett v. Marvel, 9 Cal. App. 2d 629, 51 P. 2d 185.....	2
Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064.....	2
Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673.....	6
Seiler's Estate, In re, 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093.....	2

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Foreword.

Appellant has no desire to reargue matters set forth in his opening brief, but to confine this brief to a reply to certain matters set forth in the appellees' brief.

I.

Appellee, Ellsworth Wood Individually, Is Not the Only Party Interested in This Appeal.

Appellees point out that since this litigation began the appellee, Elaine Shipp, has died, and state that the only party interested in this litigation other than the appellant is the appellee, Ellsworth Wood, in his individual capacity, and that the estate of the deceased, Elaine Shipp, has no interest in the subject matter of this appeal. (Appellees'

Br. pp. 1 and 2.) In discussing another matter, appellee, Wood, indicates that at the trial he will prove certain allegations by an abundance of testimony in either the State or District Court. (Appellees' Br. p. 14.)

We fail to see how the appellee Ellsworth Wood can make any showing in the State Court for the reasons that:

1. He is not a party to that action [R. 17, 20, 59];
2. That action has abated on the death of the wife (hereinafter further discussed);
3. Evidence cannot be offered in the action at Bar unless appellee concedes a reversal is in order.

1. That appellee Wood cannot present proof in the State Court action is apparent by the examination of the record cited as it will appear he never has been a party of that action and has no standing in that proceeding.

2. It is elemental that an action for divorce abates on the death of a party.

In re Seiler's Estate, 164 Cal. 181, 128 Pac. 334 (Ann. Cas. 1914B, 1093);

Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064;

Kellett v. Marvel, 9 Cal. App. 2d 629, 51 P. 2d 185.

3. Appellant is unable to understand how appellee Wood can offer any evidence in the pending matter unless the Judgment of Dismissal is reversed. It is, of course, the appellant's contention that the Judgment in the District Court is erroneous and should be reversed, and appellant believes that a trial on the merits is necessary to

dispose of certain issues raised by the pleadings. The appellee Ellsworth Wood in his answer [R. 5] alleges that he is the owner of the Cadillac automobile "and was at all times mentioned in the complaint and now is entitled to possession of said automobile," that his co-defendant Elaine Shipp gave said automobile to him reserving a life estate.

In the answer of Elaine Shipp [R. 7] it is alleged that she is the owner of the Cadillac automobile and entitled to the possession thereof. No mention whatever is made in this answer that her possession is limited to a life estate or that there was any transfer of said automobile made to the appellee Ellsworth Wood. A direct conflict between the answers of Ellsworth Wood and Elaine Shipp is thus raised, and without an adjudication of this issue no title or possession could be claimed by the appellee Ellsworth Wood. As appellant has pointed out, the original contract to purchase was made in the name of the appellant on November 17, 1945 [R. 44]; the consideration paid on this contract was the check of appellant [R. 48]; the statement issued by Don Lee at the time delivery was made (March 10, 1948) was issued in appellant's name [R. 49]; the check for payment was made by appellant [R. 50]; the certificate of ownership was issued to appellant [R. 51]. Presumptively, therefore, the ownership of the automobile is in the name of appellant on the records of the Motor Vehicle Department of the State of California, and before appellee Wood is entitled to possession or ownership competent evidence must be presented and a finding made thereon that he is the owner. If there is any merit to the appellees' contention, there still exists the issue between the Estate of Elaine Shipp and Ellsworth Wood as to whom is entitled to the automobile.

II.

A Corporate Entity Will Be Disregarded Only Where It Is Shown That Under the Particular Circumstances Not to Do so Would Promote Injustice or Sanction a Fraud.

With respect to the question of disregarding the corporate entity, we believe that that is not a matter that the Court should consider on a Motion to Dismiss, and particularly where the pleadings do not adequately set forth the necessary allegations. We do not believe that either of the appellees have in their answers [R. 5, 7] made the allegations required to put that matter in issue. The Court inquired into this phase of the matter at a hearing on the Motion to Dismiss [R. 91, 92, 93]. On page 93, the Court pointed out to counsel for appellees that the plaintiff was a foreign corporation having chosen the Federal Court by reason of diversity of citizenship. The Court stated further that he would examine any authorities that counsel for appellees wished to give him considering the principle of whether or not the plaintiff was the same as an individual citizen of California, and appellees' counsel advised the Court very frankly that he had no such authority. The Court then stated as follows [R. 93, 94, 95]:

“In other words, can this court, when a foreign corporation comes here and says it is a corporation chartered under the laws or created by the laws of a certain state and is, therefore, under the holdings of the Supreme Court, to be deemed for these purposes

a citizen of that state, may this court take testimony and say: 'Ah! But that is a fake. You are really Joe Doakes, a citizen of California'; or must the court admit for jurisdictional purposes the facts of the creation? It is all a fiction, anyhow."

* * * * *

"Mr. Arditto: You still have the fundamental principle, as I understand it, and supported by the cases that we have cited in our memorandum in support of our motion to dismiss, to the effect that where the State Court acquires jurisdiction of the subject matter of the action in an action *in rem* prior to the time that the Federal Court has acquired jurisdiction, that the State Court's jurisdiction is paramount. I mean, fundamentally, nothing can be decided in this case that can't be decided in the State Court, and that is the reason for the rule.

"The Court: Yes; and that would be true in most cases, would it not, but this plaintiff says, 'I am a citizen of another state; the Constitution says that I am not required [13] to litigate my controversies with a citizen of California in the courts of California; I am entitled to litigate them in the Federal Court.'

"Mr. Arditto: Well, we are in this position: In the State Court and in this court, among other issues that will be determined, assuming this court continues in its jurisdiction as well as the State Court, will be a decision relating to whether this is, in fact, as between these parties a corporation or not, or whether it is a mere fiction through which Mr. Shipp carries on his business.

"The Court: That may all well come to pass upon a trial of the merits. Do you have anything further to add with respect to this motion?"

We believe the Court properly stated the principles that governed him in making the determination, and are, therefore, unable to understand why the Court reversed itself and dismissed the action.

It is, of course, a fundamental matter of law that a corporation, such as the appellant organized under the laws of Delaware, when it has a controversy with a citizen of this state which controversy involves more than three thousand dollars, may elect the Federal Court as a forum in which to decide its litigation. The appellee attempts to escape this law by contending that in the State Court proceeding, which was between Mr. and Mrs. Shipp, the allegations that Mr. Shipp was the owner of such portion of the stock of five corporations, including the appellant, as to require a finding that each of these corporations was but an *alter ego* of Mr. Shipp and hence parties to the State Court action. The appellee contends that the amended cross-complaint in the State Court action [R. 59-68] sufficiently puts in issue the actual existence of the present appellant as to make it the *alter ego* of Mr. Shipp. This assumption would require the State Court to set aside the corporate entity for all purposes. However, the allegations upon which the appellee relies [R. 62-65] pertain to an alleged defrauding of Elaine Shipp of money due Mr. Shipp as salary from the various corporations. These allegations, which are mere conclusions of the pleader, in no way put in issue the title to the Cadillac automobile here in question as between Elaine Shipp and the appellant Metropolitan Finance Corporation of California. As stated in *Minifie v. Rowley*, 187 Cal. 481, 487, 202 Pac. 673, to allege facts sufficient to disregard the corporate entity it is necessary to show that "the adher-

ence to the fiction of separate existence of the corporation would, under the particular circumstances sanction a fraud or promote injustice.” The circumstances alleged in the amended cross-complaint pertained solely to the equity of Mrs. Shipp in the various corporations. It is, of course, elemental that a person’s title to property may not be determined in an action to which he is not a party. (*City of Los Angeles v. Knapp*, 22 Cal. App. 2d 211, 213, 70 P. 2d 643.) Even conceding that this were possible, the action is abated by the death of Mrs. Shipp.

III.

Jurisdiction.

Jurisdiction of the District Court was acquired on the date the complaint was filed, to-wit, April 14, 1948 [R. 4]. On that date there was on file in the State Court the original complaint filed by the appellant March 4, 1948 [R. 17], and the original cross-complaint on behalf of appellee Elaine Shipp filed March 8, 1948 [R. 20]. On May 17, 1948, appellees filed their Motion to Dismiss [R. 9, 10] which was set for hearing on June 7, 1948. On June 5, 1948, two days before the hearing, there was served on Mr. Shipp in the State Court action an amended cross-complaint [R. 59-68]. It is on the basis of facts alleged in this amended cross-complaint that the appellees contend the District Court was correct in dismissing the present action, for there was no mention in the original cross-complaint in the State Court action of the present appellant Metropolitan Finance Corporation of California.

Conclusion.

We respectfully submit that the Judgment of the District Court should be reversed and the case remanded for trial on the merits.

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